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SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. _____

RICHARD G. REYNOLDS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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50 pp

I. QUESTIONS PRESENTED FOR REVIEW

A. WHEN LACK OF INTENT TO DEFRAUD IS A DEFENDANT'S ONLY VIABLE DEFENSE IN A MAIL FRAUD PROSECUTION, DOES DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF LACK OF INTENT CONSTITUTE INEFFECTIVE ASISSTANCE OF COUNSEL?

B. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING MR. REYNOLDS' § 2255 MOTION WITHOUT CONDUCTING AN EVIDENTIARY HEARING?

C. WAS IT HARMLESS ERROR FOR THE DISTRICT COURT TO FAIL TO INCLUDE TWO ESSENTIAL ELEMENTS OF WITNESS TAMPERING IN THE JURY INSTRUCTIONS?

D. WAS TRIAL COUNSEL INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE U.S. ATTORNEY'S

ABUSE OF THE GRAND JURY PROCESS BY ISSUING A GRAND JURY SUBPOENA FOR THE IMPROPER PURPOSE OF CREATING AND CHARGING THE DEFENDANT WITH WITNESS TAMPERING?

TABLE OF CONTENTS

I. Questions Presented for Review. i

II. Opinions Below 2

III. Jurisdiction. 2

IV. Constitutional and Statutory Provisions Involved . . .3

V. Statement of the Case

A. Nature of the Case. 3

B. Statement of the Facts. 3

VI. Arguments

A. WHEN LACK OF INTENT TO DEFRAUD IS A DEFENDANT'S ONLY VIABLE DEFENSE IN A MAIL FRAUD PROSECUTION, DOES DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF LACK OF INTENT CONSTITUTE INEFFECTIVE ASISSTANCE OF COUNSEL? 5

B. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING MR. REYNOLDS' § 2255 MOTION WITHOUT CONDUCTING AN EVIDENTIARY HEARING? 12

C. WAS IT HARMLESS ERROR FOR THE DISTRICT COURT TO FAIL TO INCLUDE TWO ESSENTIAL ELEMENTS OF WITNESS TAMPERING IN THE JURY INSTRUCTIONS? 17

D. WAS TRIAL COUNSEL INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE U.S. ATTORNEY'S OFFICE ABUSE OF THE GRAND JURY PROCESS BY ISSUING A GRAND JURY SUBPOENA FOR THE IMPROPER PURPOSE OF CREATING AND CHARGING THE DEFENDANT WITH WITNESS TAMPERING? 24

APPENDIX

A. Opinion denying Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255 issued by Manuel Real, United States District Court Judge, Central District of California, dated September 25, 1995. 32

B. Opinion affirming denial of Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255 issued by the United States Court of Appeals for the Ninth Circuit, dated March 31, 1997. 36

C. Opinion denying Petition for Rehearing and Suggestion for Rehearing en banc issued by the United States Court of Appeals for the

Ninth Circuit, dated June 24, 1997. 41

D. Witness tampering counts (Counts 14 and 15) in the Superseding Indictment 43

E. 18 U.S.C. § 1512(b)(2)(B) 45

TABLE OF AUTHORITIES

Cases Cited

Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) 13

Capps v. Sullivan, 921 F.2d 260 (10th Cir.1990). 10

Costello v. United States, 350 U.S. 360, 76 S.Ct. 406, 100 L.Ed. 397, 402 (1956) 27

Harmon v. Marshall, 57 F.3d 763 (9th Cir.1995). 21, 24

Hill v. Lockhart, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366 (1985). 13, 16

Machibroda v. United States, 368 U.S. 487, 7 L.Ed.2d 473, 82 S.Ct. 510 (1962) 13, 14, 17

Marrow v. United States, 772 F.2d 525 (9th Cir.1985). 15

Sanders v. Ratelle, 21 F.3d 1446 (9th Cir.1994). 10

Sanders v. United States, 373 U.S. 1, 10
L.Ed.2d 148, 83 S.Ct. 1068 (1963) 13, 14

Smith v. McCormick,
914 F.2d 1153 (9th Cir.1990). 15

Stirone v. United States, 361 U.S. 212,
80 S.Ct. 270, 4 L.Ed.2d 252 (1959). 20, 27

Strickland v. Washington, 466 U.S. 668, 104 S.Ct.
2052, 80 L.Ed.2d 347 (1984). 10, 16, 23

United States v. Alexander,
849 F.2d 1293 (10th Cir.1988) 8

United States v. Barfield,
999 F.2d 1512 (11th Cir.1993) 21, 22

United States v. Blaylock,
20 F.3d 1458 (9th Cir.1994). 13, 14

United States v. Bogart,
783 F.2d 1428 (9th Cir.1986). 28

United States v. Burrows,
872 F.2d 915, 917 (9th Cir.1989) 3, 15, 17

United States v. Caldwell,
989 F.2d 1056 (9th Cir.1993). 21

United States v. Carlson,
616 F.2d 446 (9th Cir.1980). 23

United States v. Chronic, 466 U.S. 648, 104

S.Ct. 2039, 80 L.Ed.2d 657 (1984) 12

United States v. Diamond,
430 F.2d 688 (5th Cir. 1970). 8

United States v. Elliott,
849 F.2d 554 (11th Cir. 1988) 28

United States v. Gaudin,
28 F.3d 943 (9th Cir.1994) 24

United States v. Hansen,
2 F.3d 942 (9th Cir.1993). 19

United States v. Hastings, 461 U.S. 499, 103
S.Ct. 1974,76 L.Ed.2d 96 (1983) 30

United States v. Kojayan,
8 F.3d 1315 (9th Cir.1993) 28

United States v. Larrazolo,
869 F.2d 1354 (9th Cir.1989). 30

United States v. McClintock,
748 F.2d 1278 (9th Cir.1984). 28

United States v. Mullins,
22 F.3d 1365 (6th Cir.1994). 24

United States v. Ryan,
455 F.2d 728 (9th Cir.1972). 29

United States v. Simpson,
813 F.2d 1462 (9th Cir.1987). 28

United States v. Swanson,
943 F.2d 1070 (9th Cir.1991). 17

United States v. Thomas,
32 F.3d 418 (9th Cir.1994) 8, 9

Constitution, Statutes and Regulations Cited

18 U.S.C. § 1503. 22

18 U.S.C. § 1512 . . . . . 19, 21, 22, 29

18 U.S.C. § 1512(b)(2)(A). 20

18 U.S.C. § 1512(b)(2)(B) 3, 18, 20

18 U.S.C. § 1512(b)(2)(C) 20

18 U.S.C. § 1512(b)(2)(D). 20

18 U.S.C. § 1513. 22

18 U.S.C. § 1515(a)(6). 22

28 U.S.C. § 1254.1 2

28 U.S.C. § 2255 . . . . . 2, 3, 4, 13, 14, 15, 16

Fifth Amendment to the
United States Constitution. 3, 11, 12, 20, 30

Sixth Amendment to the
United States Constitution. 3, 11, 12

Other

72 C.J.S. Postal Service § 41(c) (1987). 9

American Bar Association Standards
3-3.5 at 3.48 (2d.Ed.1980). 28

United States Attorney's Manual
9-11.015 (August 17, 1978) 28

IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THE PETITIONER, Richard G. REYNOLDS, by and through his attorney, Clifford J. Barnard, hereby petitions this Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on March 31, 1997.

II. OPINIONS BELOW

The United States District Court for the Central District of California issued an Order in case number CV-95-3775-R on September 25, 1995 denying Mr. Reynolds' 28 U.S.C. § 2255 motion.

The United States Court of Appeals for the Ninth Circuit issued a Memorandum in case number 95-56554 on March 1997 affirming the District Court's Order.

III. JURISDICTION

The date of the judgment which is sought to be reviewed is March 31, 1997.

The date of the order denying rehearing is June 24, 1997.

On September 11, 1997, Justice O'Connor extended the time within which in which to file the petition for a writ of certiorari to and including October 22, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.1.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Fifth Amendment (right to due process of law) and Sixth Amendment (right to counsel) to the United States Constitution.

The statutory provision involved in this petition is 18 U.S.C. § 1512(b)(2)(B).

V. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Mr. Reynolds brought a collateral attack pursuant to 28 U.S.C. § 2255 in the United States District Court for the Central District of California. The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 2255.

B. STATEMENT OF FACTS

Richard G. Reynolds was charged with 13 counts of mail fraud and two counts of witness tampering. He was convicted on November 7, 1991 on all counts by a jury in the United States District Court for the Central District of

California and was sentenced to 12 years incarceration. The United States Court of Appeals for the Ninth Circuit affirmed his conviction on April 29, 1993.

Mr. Reynolds then brought a collateral attack pursuant to 28 U.S.C. § 2255 in which he requested that his convictions and sentence be set aside because he had been rendered ineffective assistance of counsel.

Without holding an evidentiary hearing, the district court dismissed Mr. Reynolds' claim that trial counsel had been ineffective with regard to the mail fraud counts when he failed to present evidence which could have proven that Mr. Reynolds lacked the "intent to defraud," i.e., defense counsel failed to present evidence regarding Mr. Reynolds' substantial assets and failed to present evidence regarding Mr. Reynolds' having paid back other investors who were unnamed in the indictment. The district court also rejected Mr. Reynolds' other claims without any specific finding on them.

Since his indictment, Mr. Reynolds has maintained his

innocence and he continues in this assertion.

VI. ARGUMENTS

A. WHEN LACK OF INTENT TO DEFRAUD IS A DEFENDANT'S ONLY VIABLE DEFENSE IN A MAIL FRAUD PROSECUTION, DOES DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF LACK OF INTENT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL?

In order to convict Mr. Reynolds of the 13 mail fraud counts, the government had to prove that Mr. Reynolds had "intended to defraud" the investors. Defense counsel could have but did not present evidence to establish Mr. Reynolds' lack of intent to defraud by proving that he had in the past repaid numerous investors their original investments and their accompanying profits, and by proving that Mr. Reynolds possessed on behalf of the investors substantial assets which covered their investments. Mr. Reynolds was prejudiced by this

error since, without this evidence, the jury was deprived of evidence which would have established his only viable defense.

Trial counsel failed to investigate information known and available to him which would have revealed that, in addition to the assets introduced by the government which purportedly showed all of Mr. Reynolds' assets, Mr. Reynolds owned valuable restricted stock and owned 70 diamonds valued at approximately $700,000 which had been seized from Mr. Reynolds but had not been accounted for by the government at trial. Furthermore, Mr. Reynolds had held on behalf of the investors additional assets which were stolen from him near the time of the investigation. These items included $198,000 which was stolen from him by his secretary and her daughter, and $500,000 worth of stock which was stolen from him by two former employees. All of these assets had a cumulative value in excess of the amount owed to the managed account investors. After the government failed to include any of these as assets owned by Mr. Reynolds, trial counsel failed to present evidence

of them to the jury. This evidence was crucial to Mr. Reynolds' defense since it would have proven that he had invested the monies as promised and that the account statements were in fact true to the best of his knowledge and belief.

Lack of intent to defraud was the only defense Mr. Reynolds had to the mail fraud charges and defense counsel failed to present any evidence on this matter. Although counsel had listed over 500 witnesses for trial, he called only one witness who was of marginal, if any, value. All of the above-described evidence which trial counsel did not investigate or introduce at trial was relevant, admissible and crucial to Mr. Reynolds' defense because it was strong evidence that Mr. Reynolds' had acted in good faith. Although trial counsel did not investigate these assets, Mr. Reynolds had told him about them and had repeatedly requested that counsel investigate them. Evidence of these assets would have proven that Mr. Reynolds had, in fact, invested the monies as promised and that the account statements sent to the managed account investors

were calculated without any intent to defraud.

Furthermore, trial counsel knew of and had available numerous managed account investors who would have testified that they had been repaid, including profits. Although evidence to show that the alleged victim(s) did not lose any money may not be dispositive of the issue of fraud, it can be relevant to show whether or not a defendant had the specific intent to defraud the alleged victim. United States v. Thomas, 32 F.3d 418, 421 (9th Cir.1994).

Good faith is a legitimate and appropriate defense to allegations of fraud. United States v. Alexander, 849 F.2d 1293, 1301 (10th Cir.1988) ("[t]his court has long recognized that good faith is a complete defense to a mail fraud charge"). When the defense of good faith is raised, a defendant must be permitted to present evidence in support of this claim and a defendant must be given great latitude in what is considered relevant and therefore admissible to support it. United States v. Diamond, 430 F.2d 688, 692 (5th Cir. 1970) ("[i]ntent to

defraud is a jury question and a liberal policy as to the admission of evidence tending to prove good or bad faith should be followed").

The general rule in a mail fraud prosecution is that the defendant "should be permitted to offer any evidence which bears directly and not too remotely on his intention [to defraud], and the court should not exclude any evidence offered by accused which tends to refute the fraudulent intent charged." 72 C.J.S. Postal Service § 41(c) (1987). As the Ninth Circuit has stated,

> "[r]elevant case law in fraud prosecutions supports the defendant's position that he should have been permitted to develop fully and fairly all of the evidence that would tend to exonerate him."

United States v. Thomas, 32 F.3d at 421.

Trial counsel's failure to conduct a reasonable investigation into the facts of a case can constitute deficient performance. "[C]ounsel has a duty to make reasonable

investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 347 (1984). "Thus, we have found counsel to be ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994). When defense counsel, due to his failure to investigate the facts or his failure to investigate the law, fails to present a viable theory of defense that would have been strongly supported by the evidence, counsel's performance may be found to be deficient and prejudicial. See, Capps v. Sullivan, 921 F.2d 260 (10th Cir.1990).

Mr. Reynolds was prejudiced by his attorney's failure to present this evidence of assets and to call these witnesses because, in addition to counsel's failure to present this evidence to prove Mr. Reynolds' lack of intent to defraud, counsel failed to use this evidence to rebut the government's expert witness'

testimony regarding Mr. Reynolds' assets and the value of those assets. Government securities expert Gerald Miller's testimony mislead the jury as to the true value of the stocks invested in the managed accounts. Mr. Miller testified that stock certificates in Mr. Reynolds's possession were valued at $198,554 as of April 1, 1987. The government then added Mr. Miller's figures to its total assets chart shown to the jury to reflect that Mr. Reynolds had insufficient assets to cover the manage account statements he was sending to the investors. In response to this testimony, defense counsel failed to introduce any evidence which would have rebutted Mr. Miller's testimony.

Due to his deficient performance of failing to present Mr. Reynolds' only viable defense, defense counsel denied Mr. Reynolds effective assistance of counsel as guaranteed by the Sixth Amendment and denied him due process of law as guaranteed by the Fifth Amendment to the United States Constitution. Trial counsel was ineffective when he failed to conduct a reasonable investigation to further develop this

evidence and ineffective when he failed to present it to the jury. It was prejudicial error for defense counsel to fail to present exculpatory evidence in Mr. Reynolds' case to show his lack of intent to defraud.

Certiorari should be granted on this issue because it presents a matter of exceptional importance, i.e., whether the Fifth and Sixth Amendments require trial counsel to present a viable theory of defense when such a defense exists, the defense is known to counsel, the defense is readily provable and it is the only viable defense. "Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself." United States v. Chronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984) (citation and internal quotation marks omitted).

B. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING MR. REYNOLDS' § 2255 MOTION WITHOUT CONDUCTING AN EVIDENTIARY HEARING?

Section 2255 of Title 28, United States Code, unambiguously requires that an evidentiary hearing be granted "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief ..." Machibroda v. United States, 368 U.S. 487, 494, 82 S.Ct. 510, 7 L.Ed.2d 473, 478 (1962); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 373, 88 L.Ed.2d 203 (1985); Sanders v. United States, 373 U.S. 1, 6, 83 S.Ct. 1068, 10 L.Ed.2d 148, 156 (1963); United States v. Burrows, 872 F.2d 915, 917 (9th Cir.1989). Therefore, unless the factual assertions made by the petitioner are "patently frivolous" or "palpably incredible," if a colorable claim for relief has been made the petitioner has the right to be heard and his petition cannot be summarily dismissed. Machibroda v. United States, 368 U.S. at 495, 7 L.Ed.2d at 479; Blackledge v. Allison, 431 U.S. 63, 75-76, 97 S.Ct. 1621, 1629-20, 52 L.Ed.2d 136 (1977); United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir.1994). Only by granting a hearing to afford the petitioner an opportunity to prove the

allegations can the function of 28 U.S.C. § 2255 be served. Machibroda v. United States, 368 U.S. at 495, 7 L.Ed.2d at 479. As the Supreme Court has stated:

> "[t]he need for great care in criminal collateral procedure is well evidenced. ... [I]t is imperative that a fair opportunity for collateral relief be afforded. An applicant for such relief ought not to be held to the niceties of lawyers' pleadings or be cursorily dismissed because the claim seems unlikely to prove meritorious. That his application is vexatious or repetitious, or that his claim lack any substance, must be fairly demonstrated."

Sanders v. United States, 373 U.S. at 22, 10 L.Ed.2d at 165.

Review of the district court's decision to deny Mr. Reynolds' motion for an evidentiary hearing on his ineffective assistance of counsel claim is for abuse of discretion. United States v. Blaylock, 20 F.3d at 1464. The district court's dismissal can only be affirmed if Mr. Reynolds' allegations,

"viewed against the record, either fail to state a claim for relief or are `so palpably incredible or patently frivolous as to warrant summary dismissal.'" Marrow v. United States, 772 F.2d 525, 526 (9th Cir.1985) (citation omitted). Otherwise, a hearing is mandated.

In ruling upon a § 2255 motion when there has not been an evidentiary hearing, the court may not rely solely upon affidavits or declarations submitted by trial counsel. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990). Nor may the court rely on assumptions or presumptions about counsel's trial strategy, actions or decisions. United States v. Burrows, 872 F.2d at 918. If the defendant has made out a colorable claim that involves matters outside of the record, the court must hold an evidentiary hearing. The presiding judge may, however, supplement the record with his or her recollection of the events at issue. United States v. Burrows, 872 F.2d at 916.

In his § 2255 petition, Mr. Reynolds alleged that he was denied effective representation at trial when trial counsel failed

to investigate matters critical to Mr. Reynolds' defense of "lack of intent to defraud." An ineffective assistance of counsel claim will often require a hearing because

> "`[a]ttorney errors come[] in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. ... Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.'"

Hill v. Lockhart, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366, 370 (1985) (quoting Strickland v. Washington, 466 U.S. at 693, 104 S.Ct. at 2067.

Because Mr. Reynolds alleged sufficient facts which, when accepted as true, would have entitled him to relief, this matter must be remanded to the district court for an evidentiary hearing. Since there were controverted issues of fact which were outside the record, the district court failed to proceed in conformity with the provisions of 28 U.S.C. § 2255 when it denied Mr. Reynolds' § 2255 motion without a hearing, .

Machibroda v. United States, 368 U.S. 487, 494, 7 L.Ed.2d 473, 82 S.Ct. 510 (1962); United States v. Burrows, 872 F.2d 915, 917 (9th Cir.1989). Mr. Reynolds requests that this Court remand this matter to the district court for an evidentiary hearing to permit Mr. Reynolds to present evidence to support his allegations and to enable the district court to make appropriate rulings on these ineffective assistance of counsel claims. See United States v. Swanson, 943 F.2d 1070, 1072 (9th Cir.1991).

C. WAS IT HARMLESS ERROR FOR THE DISTRICT COURT TO FAIL TO INCLUDE TWO ESSENTIAL ELEMENTS OF WITNESS TAMPERING IN THE JURY INSTRUCTIONS?

It was not harmless error to permit the jury to convict Mr. Reynolds of witness tampering without first finding that he had acted corruptly and that he had acted with the specific intent to cause or induce a witness to destroy a document, as required by the witness tampering statute and as charged in the

indictment. Furthermore, these instructions broadened and thus impermissibly amended the indictment. Since this was not harmless error, it was ineffective assistance for defense counsel to fail to object to the improper witness tampering jury instructions which omitted these mental states.

Mr. Reynolds was charged with violating 18 U.S.C. § 1512(b)(2)(B) which states that it is a crime for a person to "corruptly" persuade another person with the "intent" to cause that person to destroy an object with the "intent" to prevent its use in an official proceeding.

The court instructed the jury that the elements of witness tampering were as follows:

> "First, the defendant knowingly attempted to persuade the person identified in the indictment, Helen Money, to destroy or conceal a document.
>
> "Second, the defendant did so intending to prevent the use of the documents in an official proceeding." (Emphasis added.)

Thus, when the court instructed the jury, it only stated that the jury had to find that Mr. Reynolds had "intended" to prevent the object's use in an official proceeding; it did not require the jury to find that Mr. Reynolds had acted "corruptly" or that he had acted with the specific "intent" to cause the person to destroy the object. Persuasion based on, "[m]ere evidence of an improper motive or bad or evil purpose is insufficient to prove corruption." United States v. Hansen, 2 F.3d 942, 947 (9th Cir.1993).

Although Section (b) of § 1512 lists four different ways that a person can tamper with a witness, Mr. Reynolds was charged with only one of those ways, that is, he was charged with "**corruptly persuading**" the witness. However, the district court instructed the jury that it only had to find that Mr. Reynolds had "**knowingly attempted to persuade** the witness in order to convict Mr. Reynolds of witness tampering.

Furthermore, the statute under which Mr. Reynolds was

charged clearly required an accused to possess the specific **"intent"** to cause or induce a witness to destroy or conceal a document. It is only in subsection (b)(2)(B) that this additional **"with intent to"** is included; subsections (b)(2)(A), (b)(2)(C) and (b)(2)(D) do not have this additional **"with intent to."** Thus, witness tampering **under this subsection**, and as charged in the indictment, required proof of dual intents and therefore required an instruction including both **"intents."** The court's erroneous instruction told the jury that it could convict Mr. Reynolds regardless of whether Mr. Reynolds had any specific **"intent"** to cause or induce the witness to destroy or conceal a document.

Furthermore, when the court failed to require the jury to find each and every element of the crime charged in the indictment, it broadened, and, therefore, impermissibly amended the indictment in violation of the Fifth Amendment to the U.S. Constitution. See Stirone v. United States, 361 U.S.

212, 216-17, 80 S.Ct. 270, 272-73, 4 L.Ed.2d 252 (1959).

The district court failed to instruct the jury on all essential elements of the crime and this was reversible error. See Harmon v. Marshall, 57 F.3d 763, 764 (9th Cir.1995). A district court's failure to instruct a jury on the essential element of use of deceitful or dishonest means constitutes constitutional error and is not harmless when it permits a jury to convict without finding the defendant guilty of that element. United States v. Caldwell, 989 F.2d 1056, 1060-61 (9th Cir.1993).

The court's failure to give proper witness tampering jury instructions was not harmless error because: (1) the jury instructions omitted two essential mental states; (2) the jury instructions impermissibly amended the indictment; and (3) the jury was not told that a defendant's statements which be believed to be true but which were objectively false were not sufficient to prove the "corruptly" element for witness tampering under 18 U.S.C. § 1512(b) (see United States v. Barfield, 999 F.2d 1512, 1525 (11th Cir.1993)).

18 U.S.C. § 1515(a)(6) gives definitions for certain provisions and states that,

> "(a) [a]s used in sections 1512 and 1513 of this title and in this section -- ...
>
> "(6) the term `corruptly persuades' does not include conduct which would be misleading conduct but for a lack of a state of mind."

As the Eleventh Circuit has stated, the corrupt requirement in section 1503, "protects those individuals who are, for example, (1) attempting to clarify their statements; (2) stating something that they believe is the truth but that is objectively false; or (3) in some other way not intending to obstruct the due administration of justice." United States v. Barfield, 999 F.2d 1520, 1525 (11th Cir.1993). This should apply with equal force to section 1512.

In the present case, Mr. Reynolds' defense on this issue would have been that he had been stating something that he believed true but which was objectively false when he told a

witness to destroy a document. When he made the statements to the witness, it was his belief that the document was his personal property and that the witness had no right to turn it over to the grand jury. The improper instructions deprived Mr. Reynolds of his defense to the witness tampering charges.

An omission of two essential elements from the jury instructions was clearly error on the part of the district court. United States v. Carlson, 616 F.2d 446 (9th Cir.1980). Trial counsel's failure to object to the district court's erroneous instruction constituted both deficient performance and prejudice under Strickland v. Washington. Trial counsel's failure to object and failure to submit correct instructions rendered the result of the trial unreliable and fundamentally unfair. Mr. Reynolds was convicted of the witness tampering by a jury which had been precluded from considering two essential elements of the offense. As the Ninth Circuit has stated:

> "[w]hen proof of an element has been completely removed from the jury's determination, there can be no

inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all."

United States v. Gaudin, 28 F.3d 943, 951 (9th Cir.1994). Prejudice was therefore inherent in the district court's failure to instruct the jury on all essential elements of witness tampering and should be reversible per se. See, Harmon v. Marshall, 57 F.3d at 764.

Certiorari should be granted on this issue because the holding in Mr. Reynolds' case is in conflict with the holding in the Sixth Circuit case of United States v. Mullins, 22 F.3d 1365, 1369 (6th Cir.1994) (no error for court to instruct jury that elements were that "defendant ... knowingly attempted ... to corruptly persuade the person ... with intent to cause or induce person to ... destroy ... object").

D. WAS TRIAL COUNSEL INEFFECTIVE WHEN HE FAILED TO OBJECT TO THE U.S. ATTORNEY'S ABUSE OF THE GRAND JURY PROCESS BY

ISSUING A GRAND JURY SUBPOENA FOR THE IMPROPER PURPOSE OF CREATING AND CHARGING THE DEFENDANT WITH WITNESS TAMPERING?

On October 11, 1990, an assistant U.S. attorney issued a subpoena duces tecum ordering a witness to testify before the grand jury on October 30, 1990 and to produce all documents relating to Mr. Reynolds from January 1, 1983 to April 4, 1987. On October 30, 1990, Ms. Money appeared at the U.S. Attorney's office where she agreed to speak "informally" with an assistant U.S. attorney rather than to appear before the grand jury. During the questioning, the witness told the assistant U.S. attorney that she did not bring other documents, among which was a Western Union telegram, that pertained to Mr. Reynolds because they post-dated the request in the subpoena. The witness also told the assistant U.S. attorney that Mr. Reynolds had instructed her in the past not to tell anyone about the telegram and had told her to destroy it. During the interview,

the witness agreed to provide the assistant U.S. attorney with this telegram and agreed to telephone Mr. Reynolds to specifically discuss the telegram and to tape record the conversation. The assistant U.S. attorney told the witness to tell Mr. Reynolds about the second subpoena in their telephone conversations. The postal inspector accompanied the witness to her hotel where they tape recorded a telephone conversation between the witness and Mr. Reynolds.

On the following day, October 31, 1990, the assistant U.S. attorney issued a second grand jury subpoena duces tecum to the witness ordering her to appear before the grand jury on November 6, 1990. This second subpoena instructed the witness to bring all documents in her possession relating to Mr. Reynolds from April 2, 1987 to the present, thus including the time frame for the telegram. The witness did not appear before the grand jury on November 6, 1990, the witness did not produce the telegram to a postal inspector on November 6, 1990 and the government took no action to enforce the second

subpoena. It was not until March 26, 1991 that the witness provided the document to the government.

The issuance of this second subpoena was not necessary because the witness had already agreed to cooperate fully with and to deliver the telegram to the government. Nor was the issuance of the second subpoena ever intended to compel the witness to produce the telegram, to further interview the witness or to have her testify before the grand jury. Rather, the subpoena was issued to lure Mr. Reynolds into again telling the witness to destroy the telegram so that a factual basis for witness tampering could be established.

The grand jury was vested with the inalienable right to be independent of both the assistant U.S. attorney and the judge so that it would be able to fulfill its constitutional obligation of protecting an accused from mistaken, vindictive or unwarranted prosecutions. Stirone v. United States, 361 U.S. at 218-219, 80 S.Ct. at 274; Costello v. United States, 350 U.S. 360, 362, 76 S.Ct. 406, 100 L.Ed. 397, 402 (1956). It was the assistant U.S.

attorney's ethical obligation to ensure that justice was done, not simply to ensure that an indictment was returned. United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir.1993); United States v. McClintock, 748 F.2d 1278, 1285 (9th Cir.1984). See American Bar Association Standards 3-3.5 at 3.48 (2d.Ed.1980); United States Attorney's Manual 9-11.015 (August 17, 1978).

As a practical matter, the U.S. Attorney is permitted considerable leeway in its preparation for a grand jury investigation. United States v. Elliott, 849 F.2d 554, 556 (11th Cir. 1988). However, there are limitations, one of which is that the government cannot generate new crimes merely for the sake of pressing criminal charges against a defendant. United States v. Simpson, 813 F.2d 1462, 1470 (9th Cir.1987); United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir.1986). To do so is an abuse of the grand jury process.

In the present case, the assistant U.S. attorney overstepped her authority by issuing a second subpoena solely

to create the crime of witness tampering. Without the second subpoena, it would not have been a violation of 18 U.S.C. § 1512 for Mr. Reynolds to have told the witness to conceal or destroy the telegram. See United States v. Ryan, 455 F.2d 728 (9th Cir.1972). The record clearly shows that the assistant U.S. attorney's issuance of the second grand jury subpoena was not made in good faith because the assistant U.S. attorney never intended for the witness to appear before a grand jury, nor did the assistant U.S. attorney take any action to compel the witness when she failed to appear pursuant to the subpoena. Furthermore, there was also no legitimate government need for the assistant U.S. attorney to issue the second subpoena on October 31, 1990 because the witness was cooperating fully with the government and had agreed to provide the document which the assistant U.S. attorney had requested. The issuance of the second subpoena was an abuse of the grand jury process and amounted to prosecutorial misconduct.

Trial counsel's performance fell below the standard of

effective assistance of counsel when he failed to challenge the two witness tampering charges in the face of prosecutorial misconduct. Mr. Reynolds' Fifth Amendment rights were unconstitutionally violated because the structural protections of the grand jury were so compromised as to render the proceedings fundamentally unfair. United States v. Larrazolo, 869 F.2d 1354, 1357-58 (9th Cir.1989). Since trial counsel should have filed a motion to dismiss Counts 14 and 15 and such motion should have been have been granted, trial counsel's failure to do so prejudiced Mr. Reynolds. Mr. Reynolds convictions on Counts 14 and 15 should be vacated and dismissed.

Certiorari should be granted on this issue in order to permit this Court to exercise its inherent supervisory powers in order to protect the integrity of the judicial process (United States v. Hastings, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983)) and to protect the grand jury from unfair or improper prosecutorial conduct..

Respectfully submitted,

Clifford J. Barnard
10/21/97

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APPENDIX A

FILED
September 25, 1995
Clerk, U.S. District Court
Central District of California
By Deputy
(Stamped)

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)
(Stamped)

ENTERED
Clerk U.S. District Court
September 27, 1995
Central District of California
By Deputy
(Stamped)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. R.G. REYNOLDS, Defendant.	CASE NO. CV95 -3775-R ORDER

Defendant again questions his conviction on 13 counts of mail fraud and 2 counts of witness tampering claiming insufficiency of the evidence. The record belies the claim. The testimony of two former employees to the practice of defendant in mailing account statements, the testimony of victims of their receipt of account statements in the mail, and the evidence of amounts defendant spent on postage is more than sufficient to meet the standards of United States v. Brackenridge, 590 F.2d 810, 811 (9th Cir.1979), on circumstantial evidence.

Instead of applying the law concerning direct and circumstantial evidence and acceptance of victims' testimony that they received their statements in the mail defendant merely "nit picks" in an effort to mislead this court as to the evidence adduced at trial.

Defendant next claims that he was the victim of the ineffective assistance of counsel. In this claim with 20/20 hindsight defendant fly specks the performance of hi trial counsel but never reaches the standard of Strickland v.

Washington, 466 U.S. 668, where the Supreme Court establishes the standard as one considering all the circumstances was the defendant prejudiced so as to deny him a fair trial. His trial counsel Michael Balaban an experienced criminal lawyer with over 25 years of experience vigorously defended this case using every opportunity to present the defendant as an honest and upright business man. Unfortunately the facts with which Mr. Balaban was required to work were just the opposite as the trial record and appellate record shows. He now wants to try his case again under the guise of a motion pursuant to 28 U.S.C. §2255. §2255 is neither a motion for new trial nor a rehearing on appeal.

His prosecutorial misconduct claim is vacuous as is his stolen asset theory now coming forward at this late date and should be rejected out of hand. The record in both courts show he was constitutionally and validly convicted and sentenced.

With what defendant has presented in his motion and reply and the response of the government there appears to be no

need for a hearing in this matter since all defendant is doing is attempting to re-try his case on much the same theories he advanced at trial and on his appeal.

The motion is denied.

DATED: September 25, 1995.

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED
March 31, 1997
Cathy A. Cattterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

INTHE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 95-56554
Plaintiff-Appellee,	)	
	)	D.C. No. CV-95
	)	-03775-R
v.	)	
	)	
RICHARD GONZALES REYNOLDS, aka: "R.G." REYNOLDS; aka: RICHARD REYNOLDS; aka: RICHARD G. REYNOLDS; aka: RICHARD FERNANDO GONZALES; aka: RICHARD GONZALES,	)	MEMORANDUM*
	)	
Defendant-Appellant.	)	

Appeal from the United States Disitrict Court
for the Central District of California
Manuel L. Real, Chief Judge, District Judge Presiding
Argued and Submitted March 3, 1997

Pasadena, California

Before: SCHROEDER, WIGGINS, and LEAVY, Circuit Judges.

Federal prisoner R.G. Reynolds appeals the district court's denial of his 28 U.S.C. § 2255 motion challenging his jury conviction for 13 counts of mail fraud, 18 U.S. C. § 1341, and three counts of witness tampering, 18 U.S.C. § 1512 (b) (2) (B).

In his Section 2255 motion Reynolds alleged (1) that there was insufficient evidence presented at trial to prove that he had used the "United States Postal Service" to support 11 of his 13 mail fraud convictions, and (2) that he had been rendered ineffective assistance of counsel at trial and on appeal.

This district court denied Reynold's Section 2255 motion and accurately observed that "the record belies the claim" that the evidence was insufficient to prove use of the

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

mails:

> The testimony of two former employees to the practice of defendant in mailing account statements, the testimony of victims of their receipt of account statements in the mail, and the evidence of amounts defendant spent on postage is more than sufficient evidence to meet the standards of United States v. Brackenridge, 590 F.2d 810, 811 (9th Cir. 1979), on circumstantial evidence.

Moreover, Reynolds did not introduce evidence at trial to rebut the government's proof regarding the use of the mails, in contrast to the defendant in United States v. Wosepka, 757 F2d 1006, 1009-10 (9th Cir.), modified, 787 F.2d 1294 (1985), overruled on other grounds, United States v. Nolasco, 926 F.2d 869 (ith Cir. 1991). In Wosepka, the defendant successfully rebutted the government's evidence of "mailing," by introducing the cover letter to a document that constituted one of the mailings charged, which expressly stated that the document had been delivered "via Federal Express." In this case, therefore, defense counsel's choice not to include sufficiency of the evidence on this element of mail fraud as

additional grounds for his Rule 29 motion was reasonable and could not have affected the outcome of defendant's trial. See Strickland v. Washington, 466 U.S. 668, 688-93 (1984); Lowry v. Lewis, 21 F.3d 344, 346 (ith Cir. 1994) (applying Strickland standard).

Reynolds also claims that his former counsel was ineffective in failing to request a jury instruction specifically defining "use of the mails" to mean "use of the United States mails." The jury was properly instructed that in order for defendant to be guilty of mail fraud, the government was required to prove, beyond a treasonable doubt that (1) the defendant knowingly devised or participated in a scheme to defraud and to obtain money or property by means of false pretenses, representations or promises; (2) the defendant acted with the intent to defraud; and (3) the defendant used, or caused to be used, the mails to carry out the scheme. There was no ineffective assistance of counsel in failing to request a more elaborate instruction on use of the mails.

Reynolds' remaining claims are without merit.

AFFIRMED.

APPENDIX C

NOT FOR PUBLICATION

FILED
June 24, 1997
Cathy A. Cattterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

INTHE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 95-56554
Plaintiff-Appellee,	)	
	)	D.C. No. CV-95
	)	-03775-R
v.	)	(Central California)
	)	
RICHARD GONZALES	)	
REYNOLDS, aka: "R.G."	)	ORDER
REYNOLDS; aka: RICHARD	)	
REYNOLDS; aka: RICHARD G.	)	
REYNOLDS; aka: RICHARD	)	
FERNANDO GONZALES; aka:	)	
RICHARD GONZALES,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: SCHROEDER, WIGGINS, and LEAVY, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 1990 Grand Jury

UNITED STATES OF AMERICA,	) NO. CR-91-276(A)-R
	)
	) AMENDED
Plaintiff,	) FIRST SUPERSEDING
	) INDICTMENT
vs.	)
	) [18 U.S.C. § 1341; Mail
R.G. REYNOLDS, also known as Richard Reynolds,	) Fraud; 18 U.S.C § 2(b):) Causing an Act to Be
	)Done; 18 U.S.C. §
Defendant.	) 1512(b)(2)(B): Witness
	) Tampering]

The Grand Jury charges:

. . .

COUNT FOURTEEN

[18 U.S.C. § 1512(b)(2)(B)]

8. On or about November 6, 1990, within the Central District of California, defendant R.G. Reynolds knowingly attempted to corruptly persuade Helen Money, with intent to cause and induce Helen Money to destroy, mutilate and conceal

a document, and with the intent to impair the document's availability for uses in an official proceeding before a federal grand jury in the Central District of California.

COUNT FIFTEEN

[18 U.S.C. § 1512(b)(2)(B)]

9. On or about November 1, 1990, within the Central District of California, defendant R.G. Reynolds knowingly attempted to corruptly persuade Helen Money, with intent to cause and induce Helen Money to destroy, mutilate and conceal a document, and with the intent to impair the document's availability for uses in an official proceeding before a federal grand jury in the Central District of California

. A TRUE BILL

LOURDES G. BAIRD
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

APPENDIX E

(Statute in effect on November 6, 1990)

18 U.S.C. § 1512. Tampering with a witness, victim, or an informant

. . .

(b) Whoever **knowingly uses intimidation or physical force**, threatens, or **corruptly persuades** another person, or attempts to do so, or engages in misleading conduct toward another person, **with intent to--**

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object **with intent to** impair the object's

integrity or availability for use in an official proceeding;

(c) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years; or both. [Emphasis added].